STATE BAR OF CALIFORNIA
COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Meeting Summary – Open Session

Friday, August 27, 2004
(9:30 am - 12:30 and 1:30 - 4:45 pm)

Saturday, August 28, 2004
(9:00 am - 5:00 pm)

State Bar of California–Los Angeles
1149 South Hill Street
Los Angeles, CA 90015
(213) 765-1000

MEMBERS PRESENT: Harry Sondheim (Chair); JoElla Julien; Stanley Lamport; Raul Martinez; Kurt Melchior; Hon. Ignazio Ruvolo (S.F. by videoconference); Jerry Sapiro (S.F. by videoconference); Mark Tuft; Paul Vapnek; and Tony Voogd.

MEMBERS NOT PRESENT: Karen Betzner; Linda Foy; Ed George and Ellen Peck.

ALSO PRESENT: Jonathan Arons (BASF Liaison); Myles Berman; Jonathan Bishop (State Bar Staff); Carole Buckner (Western State University); Randall Difuntorum (State Bar Staff); Diane Karpman (Beverly Hills Bar Association Liaison); Lauren McCurdy (State Bar Staff); Kevin Mohr (Commission Consultant); Chris Munoz (BASF Liaison); Joanne Robbins (COPRAC Liaison); Toby Rothchild (Access to Justice Commission Liaison); and Mary Yen (State Bar Staff).

I. APPROVAL OF OPEN SESSION ACTION SUMMARIES FROM THE MAY 7 & 8, 2004 AND JULY 9, 2004 MEETINGS

The draft summary for the May 7 & 8, 2004 meeting was approved. The draft summary for the July 9, 2004 meeting was approved as amended.

II. REMARKS FROM THE CHAIR

A. Chair's Report

The Chair thanked members for exchanging e-mails and identifying important issues for discussion at the meeting. Lead co-drafters were asked to assure that all members of a co-drafter team are given a fair opportunity to contribute to agenda items. The Chair suggested that lead co-drafters: (1) make an effort to telephone members of a co-drafter team, if necessary to assure input; and (2) consider arranging with staff for a team teleconference.

For future planning, the Chair outlined the following new and continuing assignments:

- 3-210 (Mark-lead, Linda & Ed) **NEW**
- 3-310 (Linda, Ellen & Kurt) **NEW**
- 1-100 (Stan)
- 2-100 (Raul; team also assigned MR 4.3)
- 2-200 (Stan)
- 2-300? (Jerry)
- 2-400 (Raul added to Drafting Team w/ Ed & Karen))
- 3-300 (Stan)
- Law Firm Definition (Stan & Mark)
- 3-200 (Tony wants to respond to Jerry's 8/26/04 E-mail)
- 1-400 (Drafting Team to address 1-320(B),(C) & 2-200(B) placement issue)

B. Staff's Report

Staff distributed a comprehensive collection of public comment letters saved to cd-rom. Mr. Mohr described procedures for transferring the PDF and MS Word files onto a hard drive in a single folder so that the links in the provided comment chart would remain functional.

Staff reported on the status of SB 1246 (Burton) and discussed the potential for a State Bar referral to the Commission for an expedited rule study.

III. MATTERS FOR ACTION

A. Consideration of Rule 5.4. Professional Independence of a Lawyer (aka Rule 1-310X)

The Commission considered a Draft No. 5 of Rule 5.4 (1-310X) dated August 1, 2004. In addition, the Commission considered: (1) the issue of whether anti-competitive issues are raised by the Commission's work on 1-310X; and (2) e-mail comments addressing whether to consider, as a part of the 1-310X proposal, the issue of lawyer interference in professional judgment.

On the anti-competitive concern, the Commission considered the case *Lawline v. American Bar Association* (7th Cir. 1992) 956 F.2d 1378, cert. denied, 510 U.S. 992 (1993) [defendant bar association's issuance of opinions on ethical issues were not subject to antitrust attack as anti-competitive as the rules interpreted in the opinions were afforded state action protection]. The Commission was persuaded that any potential anti-competitive concerns would be adequately addressed by memorializing in the Commission's report to the Board that the *Lawline* case strongly suggests an applicable state exemption.

On the issue of lawyer interference with professional independence, the Commission decided to change the title of Rule 5.4 to "Avoiding Outside

Interference in the Professional Independence of a Lawyer" and to assign Mr. Ruvolo, Mr. Tuft, Mr. Vapnek, and Mr. Mohr to serve as a co-drafter team on the issue of lawyer interference in professional judgment. In making a change in the title, it was expected that there would be a conforming change to the language of subdivision (d) (such as changing the word "person" to "non-lawyer").

On Draft No. 5 of Rule 5.4, the Commission agreed upon the modifications summarized below and voted (5 yes, 2 no, 1 abstain) to tentatively approved the rule to be finalized by the co-drafters.

In rule 5.4(b), the deletion of subdivision (4) (providing an express exception for the sharing of fees with a non-profit organization) was approved by a vote of 4 yes, 3 no, and 1 abstain. It was observed that the ABA's inclusion of this provision likely did not involve consideration of abusive fee split situations that have occurred in California. In connection with this change, the Commission also considered deletion of comment [8] (specifying that sharing of court-awarded fees are permitted when in compliance with Corporations Code sec. 13406(b)). There was a consensus that comment [8] should be retained in view of the *Frye v. Tenderloin Housing District* case and that comment [8] be used as a vehicle for flagging the issue when the proposed rule is posted on the website and circulated for formal public comment.

In discussing proposed clarifications of the language describing the types of fees paid to a certified lawyer referral service (i.e., "prescribed registration fee," "member fee," and "referral fee"), the Commission reconsidered the proposed overarching requirement that a client's informed consent be obtained when sharing fees with a State Bar certified lawyer referral service. Based on information provided by Mr. Rothschild, it was agreed that a "registration fee" was analogous to an ordinary membership or subscription fee and would not constitute a fee division for purposes of the fee split prohibition. On the issue of referral fees that are actual fee divisions, the Commission took notice of the requirements in the State Bar Act (i.e., Bus. & Prof. Code sec. 6155(a)(2) (re requirement that combined charges to client not exceed the total cost that the client would normally pay if no referral service were involved) and in the State Bar Rules and Regulations Pertaining to Lawyer Referral Services (i.e., Rule 10.3 re requirement that a referral service conduct an annual review that surveys clients and specifically inquires whether a client believes that the fees charged were reasonable; and Rule 16 providing for State Bar investigatory audits of referral services). The Commission gave great weight to these provisions and, moreover, acknowledged that CRPC 1-600(B) is a suitable disciplinary charging vehicle for holding individual members of the bar accountable for client harm resulting from violations of the statutes and rules governing the operation of a certified lawyer referral service. In consideration of all of the foregoing, the Commission voted 4 yes, 3 no, and 1 abstain to delete the proposed requirement to obtain the client's informed consent.

In rule 5.4(b)(1), the Commission agreed to add the phrase "in a lump sum" following the word "money" and to add the phrase "to the trustee of a trust established by the lawyer" after the phase "the lawyer's estate."

In connection with rule 5.4(b)(2), the Commission asked the codrafters to modify the discussion section to clarify that the phrase "to the lawyer's estate or representative" is intended to cover the trustee of a trust established by a lawyer or the lawyer's attorney-in-fact, or the conservator of the lawyer's estate.
In rule 5.4(e), the Commission agreed to add the word "other" between the word "or" and "entity."

In connection with rule 5.4(e)(1) and discussion paragraph [4], the Commission discussed the issue of whether the rule text or the rule discussion section should address the holding of law corporation shares in a trust. It was reported that the liaison from the Trusts and Estates Section has referred this issue to the Trusts and Estates Section ethics subcommittee for further study and possible informal input to the Commission. It was suggested that it would be sufficient at this time to flag the issue for comment and further consideration and not attempt to craft rule text until comments are received. The Commission voted 6 yes, 1 no, and 1 abstain, to keep this topic in the rule discussion section as set forth in paragraph [4].

In discussion paragraph [1], the Commission asked the codrafters to clarify the thought that protection of professional independence is intended by imposing restrictions on the sharing of fees.

The Commission agreed to the deletion of all of discussion paragraph [7] based on concerns that the stated exception to the rule for public agencies and court-annexed activities was overbroad.

The Commission agreed to add the language of RPC 1-600(B), regarding the binding effect of lawyer referral service provisions, at the end of the text of rule 5.4.

[Intended Hard Page Break]

B. Consideration of Rules: 1-300 (Unauthorized Practice of Law); 1-320 (Financial Arrangements With Non-Lawyers); and 1-600 (Legal Service Programs

In response to the Chair's assignment to consider whether there are any issues or components in these rules that are not covered by proposed rule 5.4 (1-310X), the codrafters reported, and the Commission agreed, that any remaining issues not covered by proposed rule 5.4 (1-310X) are under consideration in connection with rule 1-300 and the discussion section language to that rule, including language presenting case law concerning the definition of the practice of law (and relating to the MR 5 series of rules); or the Commission's proposed advertising rules (issue of possible inclusion of RPC 1-320(B) & (C) and 2-200(B)). On the issue of a definition of the "practice of law," it was noted that Massachusetts had recently adopted a proposed definition for addition to its rules of professional conduct (in the preamble and in rule 5.5).

[Intended Hard Page Break]

C. Consideration of Rule 2-200. Financial Arrangements Among Lawyers

The Commission considered a Draft No. 2 of proposed amended rule 2-200 (dated 5/11/04) and an August 10, 2004 memorandum from Mr. Lamport asking a threshold policy question of "Should there be a rule?" Mr. Lamport presented the background of the Commission's consideration. The Chair began discussion of the threshold policy issue of whether to retain the rule. Among the points made during the discussion were the following.

(1) The Supreme Court's discussion in the *Chambers v. Kay* decision makes clear that RPC 2-200 serves important public protection functions.

(2) RPC 2-200 is needed in California because of California's historical liberal approach to division of fees among lawyers. California's policy departure from the more restrictive ABA rule on referral fees (which is the majority rule across the states) is a key reason for not eliminating RPC 2-200.

(3) The specific rationale of "a client's need to know" is not compelling when you consider the practices of large firms and their nearly unrestricted ability to change case assignments without complying with RPC 2-200.

(4) The practical client benefit in knowing whether and how fees are divided becomes apparent when viewed from the perspective of a corporate counsel's use of an outside law firm that, in turn, brings in an outside specialist. The client/corporate counsel should have an opportunity to consider a direct hiring of the subcontractor.

(5) The Los Angeles County Bar Association has identified various policy reasons for the rule in its Formal Opinion No. 467 and these reasons militate in favor of maintaining a rule.

Following the above discussion, it was the sense of the Commission that the rule should be maintained.

Next, the Chair called for discussion of the co-drafters' proposal to modify the rule to specify when consent must be made to a client (e.g., at the time when attorneys agree to divide fees or at a later time). Among the points made during the discussion were the following:

(1) The *Mink v. Macabee* (2004) 17 Cal.Rptr.3d 486 case suggests that earlier disclosure and consent, rather than later, is more meaningful to a client for the obvious reason that the client's right to object is given greater effect when it arises before legal services are provided by an outside lawyer.

(2) Requiring early compliance is problematic if the terms of a fee split and the identity(s) of the outside lawyer(s) is not known until later in the representation when the need for a trial lawyer or other specialist arises.

(3) In a common, pure referral fee setting (plaintiff's PI contingent fee litigation), the referred attorney, not the original attorney, acquires control of both the client

and the funds to be recovered and this imposes a practical incentive for the original attorney to pursue early compliance.

(4) For all contingent fee settings, some attorneys construe the State Bar Act written fee agreement provisions (Bus. & Prof. Code sec. 6147(a)(2)) as setting a requirement for client notice of both referrals fees and fees for services to be rendered by outside lawyers.

(5) While there may be certain common referral fee scenarios, the Commission must be cautious in adopting a "one-size-fits-all' requirement for early disclosure and consent.

(6) If the trigger will be defined as the "agreement to divide fees," then there is a concern that ordinary principles of contract modification will impose multiple points of compliance.

(7) A rule requiring early compliance may be a disincentive to pure referral fees and may undermine California's longstanding policy of encouraging referrals to competent lawyers. The disincentive would arise from a lawyer's natural concern that a client might misconstrue an early fee split disclosure as an admission that the fee is so large that it can compensate more than one attorney.

(8) Cases suggest that lawyers are not following the rule and maybe this is, in part, the result of procrastination. Changing the rule to require early compliance prevents failure to comply that is caused by procrastination.

Following the above discussion, the Commission determined to revise the rule to require client consent a the time of an agreement to divide fees. The vote was 7 yes, 2 no, and 0 abstain. Mr. Melchior reserved the right to submit a written memorandum stating his dissent.

Next, the Chair called for discussion of whether the introductory language used in the rule should track the language in MR 1.5(e) "A division of a fee between lawyers who are not in the same firm may be made only if: . . . ." It was suggested that the reference to "firm" be changed to "law firm." There was no objection to this suggestion and, with this modification, it was the consensus of the Commission to use the introductory language of MR 1.5(e).

Next, the Chair called for input to help the co-drafters implement the Commission's decision to impose a requirement to obtain client consent at the time of an agreement to divide fees. It was suggested that the co-drafters could simplify the language by a reference to RPC 4-200 to address the limitation on fee increases.

Next, the Chair called for discussion of issues raised in the various e-mail messages and other written comments on the proposed amended rule. Among the points made during the discussion were the following:

(1) Regarding Judge Bufford's comment concerning "appearance attorneys," it was suggested, based on the analysis in State Bar Formal Op. No. 2004-165,

that the application of RPC 2-200 depends on the specific terms on the appearance attorney's compensation.

(2) Regarding the Los Angeles County Bar Association's comment concerning a fee split exception for law firms involved in a joint venture representation, there was consensus that the co-drafters should explore adding discussion language addressing a de facto "court approval" exemption in relevant situations, such as class action representations.

(3) Regarding Mr. Vapnek's comment suggesting that the identity of an outside lawyer may be a necessary element in making disclosure to a client, there was consensus that the co-drafters could attempt to draft language on the possible importance of the outside lawyer's identity.

(4) Regarding the OCTC comment on law firm discipline, the Chair asked Ms. Yen to inquire with OCTC about specific examples of situations where it was problematic to identify and prosecute a responsible lawyer.

Following discussion, the Chair asked the co-drafters to implement the Commission's decisions in a revised draft rule and to respond to e-mail comments not yet addressed (i.e., comments from Ms. Stretch, Ms. Moore, and Mr. Mohr). Mr. Lamport asked Mr. Mohr to provided assistance in organizing outstanding issues.

[Intended Hard Page Break]

D. Consideration of Proposed New Rule or Amended Rule Prohibiting a Request or Agreement to Waive the Attorney-Client Privilege

The Commission considered a May 27, 2004 e-mail message from Mr. Melchior proposing adoption of a new rule or rule amendment prohibiting an attorney from offering or requesting a waiver of attorney-client privilege by a party which is not that attorney's client. Mr. Melchior presented the background of this proposal and the Chair called for a general discussion. Among the points made during the discussion were the following.

(1) The proposal may improperly interfere with client's lawful ability to voluntarily waive the privilege when it is believed to be in the client's best interest. It may preclude common scenarios where a defense counsel would advise a secondary target in a criminal investigation to cooperate with prosecutor's goal of convicting the primary target.

(2) The rule may be exploited by counsel as a shield against investigations of alleged lawyer misconduct.

(3) The a/c privilege is a statutory construct and, as such, may be beyond the purview of the RPC's and the Commission.

(4) The proposal could be recast to address improper outside interference with an attorney-client relationship (i.e., by analogy 2-100) and this general standard might cover a/c privilege issues that are emerging as a result of new Federal sentencing guidelines and the Thompson memorandum.

(5) The interference results from the potential chilling effect on a lawyer's otherwise thorough investigation. In addition, there is a level playing field issue when prosecutors attack the a/c privilege. RPC 1-500 is precedent for a rule that renders certain bargaining chips off limits.

(6) The a/c privilege is a substantive client right, not a lawyer's right. A corporate client is a creature of the state and the status and extent of a corporation's right to an a/c privilege falls within the purview of the state.

(7) The RPC's are not the forum for determining that a category of contracts are void as against public policy.

(8) The RPC's are not that effective for controlling client rights in litigation matters and this is exemplified by the *Evans v. Jeff D.* statutory attorney fee issues and by the general practice of release dismissal agreements.

(9) If adopted, this new rule could be characterized as an interference with a prosecutors professional independent judgment.

(10) By analogy to RPC 2-100 (MR 4.2), the *Lopez* case, and the subsequent McDade amendment by Congress, there seems to be support for the proposition that the concept of the proposed new rule is within the Commission 's purview.

Following discussion, the Commission determined to explore whether there is a principle of professional responsibility that supports the concept that interfering with a client's ability to obtain competent legal advice is a form of overreaching that essentially vitiates the attorney-client relationship. The vote was 6 yes, 2 no, and 1 abstain. The Chair asked Mr. Melchior to serve as lead with Mr. Tuft and Mrs. Julien as co-drafters.

[Intended Hard Page Break]

E. Consideration of Rule 1-400. Advertising and Solicitation

The Commission considered a Draft No. 3 of proposed amended advertising and solicitation rules patterned on the comparable Model Rules. The Commission also considered recommendations on the existing advertising standards adopted by the Board of Governors pursuant to RPC 1-400(E). Mr. Mohr presented the background of the current drafts.

The Chair welcomed visitor Myles Berman who requested an opportunity to address the Commission on the proposed amended advertising rules. Among the comments made by Mr. Berman were the following: (1) lawyer advertising affects public confidence in the legal profession and the administration of justice; (2) after the *Bates* decision, lawyers have abused the right to advertise and have hurt public confidence; (3) an April 19, 2004 article by David Houston in the Daily Journal or the Recorder indicates some of the problems caused by lawyer advertising; (4) the *Went for It* case is an example of enhanced regulation aimed at restoring public confidence; and (5) the Commission should consider a time bar on targeted advertising or a cooling-off period; however, the Commission should not require that addresses be included in all advertisements because it is impractical and because such a requirement would mislead the public into thinking that a California lawyer's right to practice is geographically limited to local areas.

Next, starting with proposed rule 7.1, the Chair called for discussion of the issues raised by the co-drafters in the endnotes to Draft No. 3 and the issues raised by the e-mailed comments.

On endnote 9 (re proposed deletion of an advertisement retention requirement), it was reported that OCTC recommends maintaining a retention requirement to avoid an increase in investigative resources. A motion was made to maintain the retention requirement but there was no second. It was observed that the advent of real time electronic communication has rendered it problematic to apply a retention standard. As the motion to maintain a retention requirement received no second, the co-drafters proposal to delete the requirement was deemed approved. A motion was made to include a discussion section cross-reference to the statutory retention requirement and to recommend that the State Bar, with OCTC input, consider whether to seek a repeal of that requirement. This motion passed by a vote of: 7 yes, 1 no, 1 abstain.

Responding to Mr. Tuft's 8/16/04 comments and Mrs. Julien's comments on the endnotes, the Commission made the following drafting decisions: (1) change title to "Communications Concerning the Availability of Legal Services" (7 yes, 0 no, 2 abstain); (2) in 7.2(a)(2), change "written document" to "material" (6 yes, 0 no, 3 abstain); (3) in 7.2(a)(2) and (a)(4), delete "as defined in the Evidence Code" and address in discussion section (5 yes, 0 no, 4 abstain); (4) correct typo in (a)(2) by deleting the extra "or."

The Chair next called for a discussion of the use of the term "member" or "lawyer" in Draft 3 of the advertising rules. It was observed that the juxtaposition of "member" and "lawyer" in the advertising rules would be particularly confusing given the practice of interstate advertising that is likely to increase with MJP

reforms. The co-drafters suggested that the term "lawyer" be used throughout the advertising rules (7.1 through 7.5) as a place holder drafting approach that will be revisited after the entire series of rules are tentatively approved. The Commission agreed to this approach (6 yes, 1 no, 2 abstain).

The Commission agreed to change proposed rule 7.1 Disc. [1] to read ". . . about the availability of services from lawyers and law firms. . . ." (5 yes, 2 no, 3 abstain)

The Commission agreed to delete the third sentence of proposed rule 7.1 Disc. [2] (4 yes, 3 no, 2 abstain).

By consensus, the Commission agreed to Mr. Tuft's recommendation no. 5 in his 8/16/04 e-mail message.

Regarding proposed rule 7.1 Disc. [3], the Commission decided to modify the last sentence to read "The inclusion of an appropriate disclaimer or qualifying language may avoid creating unjustified expectations or otherwise misleading a prospective client." (5 yes, 1 no, 3 abstain).

Regarding proposed rule 7.1 Disc. [4], by consensus, the Commission agreed with item no. 8 of Mr. Tuft's 8/16/04 e-mail (re statement that the list of communications is not intended to be inclusive).

Next, the Chair called for discussion of a Commission member's recommendation that rule 7.2(b) (re prohibition on compensation for recommending a lawyer's services) be deleted as unnecessary. Among the points raised during the discussion were the following.

(1) "Running & Capping" are arcane concepts. Many advertisements are presented in the form of news stories or editorials.

(2) A literal reading of 7.2(b) would preclude typical rewards given to law firm "rainmakers."

(3) The modern practice of strategic alliances is impacted by 7.2(b).

Following discussion, the Commission decided to retain 7.2(b) as modified to read "A member shall not give anything of value to a person for recommending the member's services except that a member may. . ." (5 yes, 2 no, 2 abstain).

Next, the Chair called for discussion of endnote no. 20 (re 7.2(b)(4) and incorporating RPC's 1-320(B) and 2-200(B)). Mr. Mohr presented the background of this issue explaining the overlap of the prohibitions. It was observed that the rules would be more user-friendly if similar topics were handled in one place. It was suggested that the real issue is the problem of negligent referral, and not compensation for referrals. After brief discussion, the Chair appointed a subcommittee (Mr. Ruvolo; Mr. Mohr; Mrs. Julien; and Mr. George) to consider 1-320(B)(C), 2-200(B), 7.2(b)(4); and submit a recommendation on whether the concepts should be consolidated.

Next, the Commission turned to the proposed rule 7.2 Discussion section paragraphs. Regarding proposed rule 7.2 Disc. [1], the Commission considered a motion to delete it because the language appeared inconsistent with the usual style of RPC discussion text. The motion to delete it failed by a vote of 4 delete, 5 retain, and 1 abstain.

Regarding proposed rule 7.2 Disc. [2], in the absence of any objection, the Chair deemed the language approved.

Regarding proposed rule 7.2 Disc. [3], the Commission considered a motion to delete it as drafted. The motion to delete it passed by a vote of 7 yes, 1 no, 1 abstain. After this vote, the Commission considered a follow-up motion to revise the last sentence of this paragraph and add it back to the discussion section. The revised sentence would read: "Rule 7.2 permits advertising by electronic media, including but not limited to television, radio and the internet." The motion to add this sentence passed by a vote of 5 yes, 2 no, and 1 abstain.

Regarding proposed rule 7.2 Disc. [4], the Commission considered a motion to delete it as drafted. This motion passed by a vote of 7 yes, 1 no, and 3 abstain. In follow-up, on the issue of direct contact under proposed rule 7.3, the Commission considered a motion to add a discussion section sentence stating: "Rule 7.3 is not intended to prohibit communications authorized by law." By way of example, it was observed that: (1) *In re Primus* permits certain direct solicitation; and (2) RPC 3-700 authorizes, if not requires, a "leaving associate" to directly contact client's of the associate's soon-to-be former firm. This motion also passed by a vote of 7 yes, 1 no, and 3 abstain. In addition, the Chair asked Mr. Mohr, Mr. Melchior and Mr. Lamport to consider possible discussion language addressing court authorized notices sent by lawyers to persons who may be potential clients (i.e., a sentence stating: "a member who is directed by a court to send a notice, the content of which has been approved by the court, is not subject to discipline under the advertising rules").

Regarding proposed rule 7.2 Disc. [5], by consensus the Commission agreed to revise the paragraph to read:

"Notwithstanding rule 1-320(C)'s general prohibition on a member giving or promising anything of value to a representative of a communication medium in return for publicity of the member, subparagraph (b)(1), allows a member to pay for advertising and communications permitted by this Rule, including but not limited to the costs of print directory listings, on-line directory listings, newspaper ads, . . ."

Regarding proposed rule 7.2 Disc. [6], by consensus the Commission agreed to include this language with the possible addition by the codrafters of a cross reference to joint lawyer advertising described in Bus. & Prof. Code §6155(h).

Regarding proposed rule 7.2 Disc. [7], by consensus the Commission agreed to include this language with the possible addition by the codrafters of a clarifying statement along the lines of the following: "where an organization or an entity advertises on behalf of a lawyer who is a member of such organization or entity, the lawyer should take reasonable efforts to assure that the advertising does not violate applicable rules." This possible addition was prompted by comments

about vicarious exposure to discipline in circumstances where a lawyer's membership in an organization or entity does not afford that lawyer any control over the advertising conduct of the organization or entity. It also was observed that this matter is covered in the case of lawyer referral services but may be regarded as unclear in group or prepaid legal plan scenarios.

Regarding proposed rule 7.2 Disc. [8], by consensus the Commission agreed to include this language.

Regarding proposed rule 7.2 Disc. [9], by consensus the Commission agreed to include this language with the possible addition by the codrafters of a cross reference to joint lawyer advertising described in Bus. & Prof. Code §6155(h).

Next, the Commission turned to the proposed rule 7.3. The Chair deemed approved the codrafter recommendations at notes 37, 38, 39 and 40 appended to Draft 3. Mr. Melchior and Mr. Sapiro expressed concerns with language included pursuant to note 37 (re proposed rule 7.3 Disc. [1]). Mr. Sapiro also expressed concern about the language included pursuant to note 40 (re proposed rule 7.3 Disc. [4]) and suggested deletion. No other Commission members joined Mr. Melchior or Mr. Sapiro in questioning these codrafter recommendations.

Regarding proposed rule 7.3 Disc. [5], by consensus the Commission agreed to include this language.

Regarding proposed rule 7.3 Disc. [6], by consensus the Commission agreed to include this language to be modified by the codrafters to insert the qualifier "bona fide" in describing a "group or prepaid legal plan. . . ."

Regarding proposed rule 7.3 Disc. [7], the Commission considered a motion to modify it to replace the phrase "spokespersons or sponsors" with the word "representatives." The motion passed by a vote of 5 yes, 0 no, 4 abstain. The Commission also considered a motion to add the phrase "including but not limited to" so that the paragraph reads: ". . . general announcements by members, including but not limited to changes in personnel or office location. . . ." This motion passed by a vote of 5 yes, 0 no, 4 abstain.

Regarding proposed rule 7.3 Disc. [8], by consensus the Commission agreed to include this language.

Next, the Commission turned to proposed rule 7.4. The Commission considered a motion to modify proposed rule 7.4(a) and 7.4(d) by replacing the phrase "he or she" with the word "lawyer." The motion passed by a vote of 4 yes, 0 no, 3 abstain.

Next, the Chair called for discussion of the issue of Board adopted "standards" under the advertising rule (RPC 1-400(D)). At the suggestion of a Commission member, the Chair deferred discussion of advertising standards until a clean draft of the proposed rules are distributed.

[Intended Hard Page Break]

F. Consideration of Rule 1-100. Rules of Professional Conduct, in General

Matter carried over.

G. Discussion of Rule Numbering System

Matter carried over.

[Intended Hard Page Break]

H. Consideration of Proposed New Rule re Honesty in Billing [Formerly "Recording Time"]

The Commission considered an 8/1/04 draft suggested by Robert Sall, COPRAC Liaison. Mr. Voogd presented the background of the proposed new rule. The Commission considered a motion to defer any discussion of this proposal until the Commission considers RPC's 4-100 and/or 4-200. This motion passed by a vote of 5 yes, 0 no, and 3 abstain.

[Intended Hard Page Break]

I. Consideration of Rule 2-100. Communication With a Represented Party

The Commission considered a proposed amended rule and e-mail comments. Mr. Martinez presented the background of the proposed amendments. The Chair began with a discussion of a written comment recommending that the rule be repealed. It was the consensus of the Commission that the rule should be maintained as it is a standard that is universally adopted in all states and, in California, has an over 30 year history of affording necessary protection of the attorney-client relationship.

The Commission next considered the issue of changing the term "party" to "person" throughout the rule, including the rule title. It was observed that MR 4.2 uses the term "person." Following brief discussion, there was no objection to making the change and it was approved by consensus.

The Commission next considered a minor drafting change to add the word "or" after the second ";" in proposed 2-100(B)(2). There was no objection to making this change and it was approved by consensus.

The Commission next considered to what extent, if any, the concept of a "managing agent" as described in the *Snider* case should be adopted in the rule or the discussion section. It was agreed that, for now, proposed 2-100(B)(1) and (B)(2) would be kept as separate subparagraphs and the codrafters could consider the *Snider* description of managing agent for possible inclusion in Disc. [8].

The Commission next considered a motion to reject the proposed amendments to 2-100(C)(1) and instead use the language of current RPC 2-100(C)(1). This motion passed by a vote of 5 yes, 0 no, and 1 abstain.

[Intended Hard Page Break]

J. Consideration of Rule 2-300. Sale or Purchase of a Law Practice of a Member, Living or Deceased

Matter carried over.

K. Consideration of Rule 2-400. Prohibited Discriminatory Conduct in a Law Practice

Matter carried over.

[Intended Hard Page Break]

L. Consideration of Rule 3-110. Failing to Act Competently

The Commission considered an August 2, 2004 memo from Mr. vapnek recommending no changes to the current rule. Mr. Vapnek presented the background of this recommendation. The Chair called for discussion limited to the narrow issue of whether to retain RPC 3-110 in its current form. Among the points made during the discussion were the following.

(1) The current rule draws the line at "simple negligence" and this policy should be continued. The rule should not be amended to make a single act of negligence a disciplinary violation.

(2) The current rule may not be sufficiently clear on the distinction between simple and gross negligence and that is a reason to revise the rule.

(3) Consideration should be given to restoring the first part of former RPC 6-101 that states: "A member shall not willfully or habitually. . . ."

(4) An act of simple negligence can wreak great harm to a client and civil remedies may not be a sufficient remedy. Consider the plight of a client in an immigration matter who is deported because of a lawyer's negligent act. The Commission should actively assess whether the current rule's standard affords adequate public protection.

(5) The ABA and the states that have adopted MR 1.1 appear to have had no problem with a standard that can be applied to simple negligence. Prosecutorial discretion plays a key role in interpreting standards like MR 1.1.

(6) As written, current RPC 3-110 sends the wrong message to the public. It says that there is a category of lawyer incompetence that is completely fine and tolerated despite the fact that the purpose of the rules is to protect the public.

(7) It is conceded that public protection is an important policy; however, the current rule reflects an analogy to public policy on the regulation of traffic accidents where some conduct is treated as criminal and other conduct is not. Everyone is human and makes mistakes and, like the criminal law, disciplinary standards must appreciate that reality.

Following discussion, a motion to retain the terms of the current RPC 3-110 failed by a vote of 3 yes, 6 no, and 1 abstain. Accordingly, the Chair assigned the codrafters to prepare a recommendation for proposed amendments.

[Intended Hard Page Break]

M. Consideration of Rule 3-120. Sexual Relations With Client

Matter carried over.

N. Consideration of Rule 3-200. Prohibited Objectives of Employment

Matter carried over.

O. Consideration of Rule 3-300. Avoiding Interests Adverse to a Client

Matter carried over.

[Intended Hard Page Break]